FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 11, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 2000-470-M
	:	A.C. No. 24-02070-05504
JOHN RICHARDS CONSTRUCTION	:	

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On June 30, 2000, the Commission received from John Richards Construction ("Richards") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Richards.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In his request, Richards asserts that he never received a copy of the proposed assessment. Mot. at 1-2. Richards states that he was not aware of the proposed penalty and would have appealed it along with all other penalties he has appealed. *Id.* at 2. Richards requests an opportunity for a hearing on this penalty assessment. *Id.*

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, eg., Kenamerican Resources, Inc.*, 20 FMSHRC 199, 201 (March 1998); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529,

1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

On the basis of the present record, we are unable to evaluate the merits of Richards' position. While Richards claims that he did not receive the proposed penalty assessment, the reasons for, and circumstances surrounding that alleged non-receipt are not clear from the record. In the interest of justice, we remand the matter for assignment to a judge to determine whether Richards has met the criteria for relief under Rule 60(b). *See, e.g.*, *Bauman Landscape, Inc.*, 22 FMSHRC 289, 290 (Mar. 2000) (remanding where operator claimed it did not receive penalty assessment and that the return receipt was not signed by him); *Warrior Investment Co., Inc.*, 21 FMSHRC 971, 973 (Sept. 1999) (remanding where operator did not provide any explanation for alleged non-receipt of proposed penalty assessment); *Harvey Trucking*, 21 FMSHRC 567 (June 1999) (remanding to a judge where the operator did not receive the proposed penalty assessment because delivery was unsuccessful for no known reason). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

John Richards
John Richards Construction
Box 316
Seeley Lake, MT 59868

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006